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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 903

THE PEOPLE OF PUERTO RICO,
Petitioner,

v.

THE BANK OF NOVA SCOTIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT, AND SUPPORTING BRIEF.

BRIEF IN OPPOSITION TO PETITION

J. HENRI BROWN,
WALTER L. NEWSOM, JR.,
Counsel for Respondent.

May 26, 1941.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 993

THE PEOPLE OF PUERTO RICO,
Petitioner,

v.

THE BANK OF NOVA SCOTIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT, AND SUPPORTING BRIEF.

BRIEF IN OPPOSITION TO PETITION

Statement

The judgment of the United States Circuit Court of Appeals for the First Circuit which petitioner (appellant below) seeks to have reviewed here, affirmed an order entered April 3, 1940 by the United States District Court for Puerto Rico approving the final accounts of its Receiver in consolidated foreclosure proceedings in equity, discharging him and directing cancellation on his bond.[1] Contrary to petitioner's assertion (Petition, p. 1) the order contained no provisions for any distribution.

[1] The statement on the title page of the Transcript of Record in the Circuit Court of Appeals that the appeal was from the decree of September 18, 1939 is erroneous. (See the Notice of Appeal, R. 113, Exhibit B.)

By this order of April 3, 1940, the District Court overruled the contention of petitioner that the Receiver should not be discharged because he had not paid petitioner's alleged prior tax claim set up in petitioner's intervention and answer filed in the foreclosure proceedings. As to that contention that Court held as follows (R. 99):

> "The tax claim of The People of Puerto Rico as to the amount and relative priority thereof was adjudicated by the final decree entered in this cause September 18, 1939, from which no appeal was taken.[2] A motion for rehearing filed by The People of Puerto Rico after expiration of the term at which said decree was entered was subsequently denied. That part of said tax claim held to enjoy priority over the mortgages foreclosed has been paid by the Special Master pursuant to provisions of said decree. There could be no obligation on the Receiver to pay any part of said tax claim. The Receiver had paid all taxes assessed on the properties in his custody during the receivership."

The operations of the Receiver were carried on at a loss, and his final accounts showed a deficit of almost $150,000.00 (R. 94-95). The Receiver never had in his custody any funds arising from the proceeds of the foreclosure sale. Such funds were paid by the purchaser to the Special Master (who was a different individual from the Receiver) and it was the Special Master, not the Receiver, who was by the foreclosure decree of September 18, 1939, charged with the duty of distributing the proceeds of the foreclosure sale (R. 118, see also the decree R., pp. 76-85). Following the sale and its confirmation, the properties were conveyed on December 23, 1939 to the purchaser by the Special Master (R. 90), the conveyance approved by order of the Court, and the Receiver, pursuant to order of the Court, delivered possession thereof to the purchaser on January 16, 1940 (R. 93).

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[2] In the record, page 99, the date is erroneously put as "September 18, 1940". The true date of entry appears in the Record at pp. 36, 88 and other places.

Thus at the time the Receiver filed his final accounts on February 29, 1940 (R. 92) which were approved by the said order of April 3, 1940 (R. 98-100), the Receiver had no funds or properties in his custody from which petitioner's alleged priority tax claim could have been paid or satisfied.

Petitioner does not contend that the Receiver's accounts should be surcharged, or that his official bond should be held liable for petitioner's claim. As the District Court stated in the said order appealed from (R. 99):

> "An examination of the record and especially the reports on the audits of the Receiver's accounts—shows that the Receiver has diligently and efficiently performed the duties appertaining to his charge, that he has carried out all orders and instructions given to him by the Court, and that he has duly accounted for all the properties and moneys coming into his hands as receiver. And in fact no one has contended otherwise."

And petitioner did not make the Receiver a party appellee to the appeal from the said order of April 3, 1940.[3]

Petitioner never appealed from the foreclosure decree of September 18, 1939 in which its tax claim and the priority thereof was adjudicated (R. 116). It did file a motion for reconsideration of said decree in the next succeeding term of the District Court and after the time within which an appeal might have been taken, which motion was denied (R. 88-92). Petitioner filed a notice of appeal from the order denying this motion for reconsideration after expiration of the statutory term within which an appeal might have been taken.[4] This abortive appeal, however, was dis-

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[3] (See Certificate of Clerk of District Court, par. 7, R. 107, appellant's Statement of Points, R. 101-102, and Designation of Contents of Record on Appeal, R. 102-103.)

[4] Petitioner now says that this belated appeal was not perfected because the Order of the District Court denying the motion for reconsideration was considered by it as "interiocutory". (Petition, par. 6, pp. 8-9.) It seeks to justify its failure to seasonably take the appeal by

missed by the Circuit Court of Appeals for lack of jurisdiction (R. 117, first full paragraph).[5]

Petitioner made no objection to the Special Master's sale under the foreclosure decree held November 14, 1939, nor to his report, nor to the confirmation of that sale by the District Court December 11, 1939 (R. 89-90). Nor did it ever appeal from the decree of confirmation.

Petitioner never made any objection to the execution by the Master of the deed of conveyance to the purchaser (R. 90) nor to the delivery to the purchaser of possession of the properties by the Receiver (R. 93).

Petitioner accepted without objection the payment by the master from the proceeds of the foreclosure sale of that amount of its tax claim held to have priority by the foreclosure decree (R. 91 and 99), and it made no objection to his distribution, final report, accounting and discharge.

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asserting that the New Rules for Civil Procedure had just become effective. (Petition note 6, p. 8.) But the statutory term within which an appeal may be taken (Act of February 13, 1925, Section 8(c); 28 U. S. C. A. 230) was in no way affected by the New Rules. (Note 3 of the "Notes of Advisory Committee on the Rules" following Rule 73.)

[5] While it seems obvious that neither this Court nor the Circuit Court of Appeals could have any jurisdiction to review the order of the District Court denying the motion for reconsideration, yet petitioner's contention is that the District Court erred in refusing to reconsider the foreclosure decree. For the first time, petitioner here urges that its motion for reconsideration should have been considered by the District Court as a "Bill of Review" for error apparent on the face of the record (Petition, Fourth par., p. 11). But it is fundamental that a bill of review for error apparent on the face of the record cannot be filed after expiration of the statutory term within which an appeal might have been taken. (*Thomas* v. *Brockenbrough*, 10 Wheat. 146, 6 L. Ed. 287; *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207, 34 L. ed. 97; *Hagerott* v. *Adams*, 8 Cir. 1932, 61 F. (2d) 35, cert. den. 288 U. S. 599, 77 L. ed. 975.) Nor do we understand how petitioner can on the one hand contend that the foreclosure decree was not final, and on the other contend that its motion for reconsideration should have been considered as a bill of review. A bill of review lies only after a final decree—one that finally adjudicates upon the entire merits, leaving nothing further to be done except the execution of it. (*John Simons Co.* v. *Grier Bros. Co.*, 258 U. S. 82, 88, 66 L. ed. 475; *First Nat. Bank* v. *Flershem*, 290 U. S. 504, 522, 78 L. ed. 465, 477.)

It took no appeal from the order approving said distribution, report and accounting, discharging the master and ordering the cancellation of his bond. Not included in the transcript of record.)

On the appeal from the order of April 3, 1940 approving the Receiver's accounts, discharging him and directing cancellation of his bond, petitioner, however, sought to have the Circuit Court of Appeals review the foreclosure decree of September 18, 1939, and the order of January 31, 1940, denying its motion for reconsideration. It contended that the foreclosure decree was erroneous under a subsequent decision of the appellate court (*People of Puerto Rico* v. *The Federal Land Bank*, 1 Cir. Dec. 15, 1939, 108 F. (2d) 275, Reh. Den. Jan. 19, 1940), upholding the validity of Section 5 of Act No. 23 of the Puerto Rican Legislature approved July 16, 1936 as amended by Act No. 122 of that Legislature approved May 13, 1937 (Petition, p. 2). This was not the ground urged by petitioner in its motion of reconsideration which the District Court had denied.[6]

Petitioner would have the Court assume that the foreclosure decree of September 18, 1939 showed error on the face of the record, that said decree held Section 5 of said Act No. 23 of July 16, 1936, as amended by said Act No. 122 of May 13, 1937, to be invalid, contrary to said decision of the Circuit Court of Appeals in the case of *The People of Puerto Rico* v. *The Federal Land Bank, supra,* as a result of which in excess of $100,000.00 of the public reve-

[6] The ground urged in support of the motion for rehearing was that the foreclosure decree of September 18, 1939, was erroneous under the decision cited, because the District Court had by said decree held invalid Section 5 of Act No. 10 of the Puerto Rican Legislature approved August 19, 1933 (R. 86). But at the same legislative session by Act No. 14 approved August 24, 1933, Section 5 of said Act No. 10 of August 19, 1933 was repealed and the pre-existing law reestablished (R. 90, third full paragraph). And the decision cited in no way involved Act No. 10 of August 19, 1933. Petitioner now urges that the mention of Act 10 of August 19, 1933 in the motion for reconsideration was an inadvertent error (Petition note 5, p. 8). The motion, however, was never amended. We think petitioner made no such inadvertent error but rather misconceived the effect of the decision cited.

nues dues would be lost.[7] We say "assume" because the Transcript of Record does not contain any of the evidence on which said decree is based. In fact, however, the District Court made no such holding. The determination of the validity of Section 5 of said Act as amended is not involved in said decree.[8]

And petitioner would now have this court review the decision of the Circuit Court of Appeals on the ground that that Court, on an appeal from the order of April 3, 1940 approving the final accounts of the Receiver, discharging him and directing cancellation of his bond, had refused to review the foreclosure decree of September 18, 1939 and the order refusing its reconsideration.

The Decision of the Circuit Court of Appeals

The Circuit Court of Appeals for the First Circuit affirmed the order of the District Court of April 3, 1940 approving the receiver's accounts, discharging him and directing cancellation of his bond.

It held (A) that there was no further occasion for the continuance of the receivership, that the receiver had fully

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[7] The total amount of real estate taxes which could possibly be subject to Section 5 of said Act, as amended, assuming said Act to be applicable, would be substantially less than $100,000 (R. par 19(f), p. 63 and par. 21(i) p. 66).

[8] There was no deferment or extension of any taxes under said Act No. 23 of July 16, 1936, as amended. Payments were made of taxes by the receiver and accepted by petitioner under a court order that such payments would not affect the priority of the mortgages as existed when the receivership commenced, and in the allocation by the foreclosure decree of the payments so made by the receiver under said order, they were applied on taxes due for the current and three past annual assessments (R. par. N, p. 85; par. 19(d), p. 62, and par. 21(g), p. 66, and R., p. 91). The District Court concluded that there was no deferment under the said Act and that the lien and priority provided in Section 5 of the Act never attached (R. par. E, p. 72). It held (R. 91) that the decision of the appellate court could not, therefore, have any effect on the decree of September 18, 1939. Petitioner's contention that the tax lien existing at the commencement of the receivership was measured by Act 23 of July 16, 1936, is therefore equally untenable, since that act applied only in case a deferment of taxes had been made thereunder.

accounted, and was entitled to his discharge and the cancellation of his bond; that (B) the issues with respect to the priority of petitioner's tax claim had been finally determined and adjudicated by the foreclosure decree of September 18, 1939, had become *res judicata,* and could not be again raised when the District Court was considering the receiver's final report.

The Circuit Court also dismissed petitioner's appeal from the order of the District Court denying the motion for reconsideration of the foreclosure decree because taken after expiration of the statutory period within which an appeal might have been taken.[9]

The opinion is reported in Volume 116 Fed. (2d) pp. 379 *et seq.*

ARGUMENT

POINT I

The Receiver was entitled to his discharge and cancellation of his bond.

A receiver in equity is an officer of the Court which appoints him, and the property in his custody is not in a legal sense, in his possession, but is in the possession of the Court whose appointee he is, by him as the Court's officer. (*Taylor* v. *Sternberg,* 1935, 293 U. S. 470, 472, 79 L. ed. 599, 602.) And the power of the appointing Court to wind up the receivership and discharge the receiver is a necessary adjunct to its power of appointment. (*Jennings* v. *F. & C. Trust Co.,* Ky. App. 1931, 240 Ky. 24, 41 S. W. (2d) 537.)

The exercise of this power by the appointing Court is so largely within its sound judicial discretion, that an appel-

[9] Petitioner apparently contends that the Circuit Court of Appeals affirmed the order denying the motion for reconsideration of the foreclosure decree (Petition, p. 12, first full par.). Obviously it did not do so, having dismissed the appeal therefrom for lack of jurisdiction.

late court will not review the action of the former in the absence of a manifest abuse of discretion. (*M. & M. R. R. Co.* v. *Soutter,* 1865, 2 Wall. 510, 17 L. ed. 900; *McLeod* v. *Hayward,* 5 Cir. 1927, 17 F. (2d) 900.)

When the purpose of the receivership has been accomplished, or the reason or necessity therefor has ceased, as for instance when the property has been sold in foreclosure and the sale confirmed (*Larsen* v. *U. S. Mortgage & Title Co.,* 93 N. Y. S. 613), or when the cause has been finally determined, and all issues litigated are at an end (*State ex rel. Ondin* v. *Superior Court,* Wash. S. C. 1903, 31 Wash. 481, 71 P. 1095), or the property has been held to belong to one of the parties (*Very* v. *Watkins,* 1860, 23 How. 469, 16 L. ed. 522), it should be terminated.

After sale and confirmation, the receiver's continued possession of the property sold is not as receiver but as agent for the purchaser. (*Very* v. *Watkins; Larsen* v. *U. S. Mortgage & Title Co., supra.*) Under such circumstances it becomes the duty of the appointing court to terminate the receivership (*Mitchell* v. *Lay,* 9 Cir. 1932, 60 F. (2d) 941), and the purchaser should apply for his discharge in order to avoid any liability arising from the receiver's apparent authority. (*Langdon* v. *V. & C. R. Co.,* Vt. S. C., 1880, 53 Vt. 228; *Larsen* v. *U. S. Mortgage & Title Co., supra.*)

Here the litigation between the parties had been terminated by the foreclosure decree of September 18, 1939. The properties had been sold in foreclosure by the master pursuant to that decree, and that sale had been confirmed. The purchase price had been paid to the master, who had distributed it pursuant to the decree including payment to petitioner of the amount of its claim held to enjoy priority, and the final report of the master had been approved, and he had been discharged. The deeds of conveyance had been executed and possession of the properties had been delivered to the purchaser. And no appeal from any of these decrees or orders had been taken by petitioner.

No one had questioned any item in the receiver's final accounting, and he had performed all of his duties diligently and efficiently. He had no funds nor properties in his hands, nor was he under any obligation to satisfy petitioner's claim. Petitioner made no contention that his accounts should be surcharged or that his official bond should be attached. Petitioner did not make him a party appellee in the appeal to the Circuit Court of Appeals.

The receiver was clearly entitled to his discharge and the cancellation of his bond, and the Circuit Court of Appeals, in affirming the District Court's order of April 3, 1940, correctly so held.

POINT II

The issues relating to petitioner's tax claim did not lie within the scope of review in an appeal from the Order of April 3, 1940.

A. **Such issues were not raised in the proceedings for approval of the receiver's final accounting, for his discharge and cancellation of his bonds.**

The proceedings on the receiver's final report and accounting were independent proceedings on a side issue in the cause in which the petitioner on the one side and the receiver on the other were the real and interested parties. (*Hovey* v. *McDonald*, 1883, 109 U. S. 150, 27 L. ed. 888.) As said in the case of *Nashlund* v. *Moon Motor Car Co.*, Mo. S. C., 1939, 345 Mo. 465, 134 S. W. (2d) 102, 105:

> "The final report of the receiver and the exceptions (objections) thereto occupy the status of pleadings, the report having the relative status of a petition or complaint, and the exceptions having the relative status of an answer. (*Cases cited.*) And the analogy continues in that the burden of proof rests on the receiver as upon a plaintiff. * * *"

And the determination and adjudication of the issues raised thereon result in a final and appealable decree. (*Barnett* v. *Schickerling Products Corp.*, N. J. Ch., 1932, 112 N. J. Eq. 1, 163 A. 144; *U. S. Fidelity & Guaranty Co.* v. *Higgins*, 9 Cir. 1930, 41 F. (2d) 739; *Yoelin* v. *Kudla*, Ill. App. 1939, 502 Ill. App. 413, 24 N. E. (2d) 67.) From such final decree the receiver has the right of appeal, *although he would not have the right of appeal from the foreclosure decree*, or that confirming the sale. In the case of *Hinckley* v. *G. C. & S. R. R. Co.*, 1877, 94 U. S. 467, 24 L. ed. 166, it was said:

> "* * *. The receiver cannot and does not attempt to appeal from the decree of foreclosure, or from any order or decree of the court, except such as relates to the settlement of his accounts. To that extent he has been subjected to the jurisdiction of the court and made liable to its orders and decrees. He has, therefore, the corresponding right to contend against all claims made against him. For this purpose he occupies the position of a party to the suit, although an officer of the court, and after the final decree below has the right to his appeal here. * * *. This will not keep anything in litigation but the receiver's accounts. The title to the property and the possession under the sale cannot be in any manner affected. * * *"

And the principal party to an appeal from such a decree is the receiver. (*Hovey* v. *McDonald, supra; Haigh* v. *Carroll*, Ill. S. C., 1902, 197 Ill. 196, 64 N. E. 375.)

Thus in the proceedings on the receiver's final accounts, none of the issues adjudicated by the foreclosure decree, the order denying the motion for its reconsideration, decree of confirmation, or order approving the distribution and final report of the Special Master, could have been raised by the pleadings (that is, the final report of the receiver and petitioner's objections thereto), nor could any such issues have been determined by or been embraced in the order of the District Court of April 3, 1940 approving the accounts, discharging the receiver and directing cancella-

tion of his bond. Nor did the District Court purport to decide any such issues. Hence there were no such issues to be reviewed on appeal by the Circuit Court of Appeals.

What the District Court did hold was that the receiver had no obligation to pay petitioner's tax claim, that he had no funds or property in his custody, and that the petitioner's tax claim had been finally adjudicated by the foreclosure decree.

And if the order of April 3, 1940 be reversed and the matter be remanded to the District Court, there would still be nothing there to be decided by that Court with respect to the tax claim of petitioner, and there would be no funds or property there from which any such claim could be satisfied. And in fact petitioner seeks no such reversal.[10] Instead petitioner asks that the foreclosure decree and the order refusing its reconsideration be reversed, that the sale and its confirmation and the distribution of the proceeds arising therefrom by the master (a different individual from the receiver) all be set aside and held as naught.[11]

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[10] The omission of the receiver as a party appellee would be fatal since the appellate court could not proceed to a revision of the order appealed from without the receiver being made a party appellee upon such terms as to give him due notice and an opportunity to be heard. (*In re Knox-Powell-Stockton Co.*, 9 Cir. 1938, 97 F. (2d) 61; *Edwards* v. *Holland Baking Co.*, 8 Cir. 1935, 75 F. (2d) 713.) The receiver is clearly an indispensable party appellee. (*Hovey* v. *McDonald, Hinckley* v. *G. C. & S. R. R. Co., Haigh* v. *Carroll, Yoclin* v. *Kudla, supra.*)

[11] The notice of the untimely appeal by petitioner from the order of the District Court of January 31, 1940 denying the motion for reconsideration of the foreclosure decree (which appeal was dismissed) and the notice of appeal from the order of April 3, 1940, were both filed in the District Court May 1, 1940 (R. 113-114, Exhibits B and C). The "Statement of Points" (R. 101) and Designation of Contents of Record (R. 102) filed June 21, 1940 in the District Court tend to show that petitioner was chiefly interested in the appellate review of the order of January 31, 1940. Respondent's motion to dismiss was filed October 14, 1940 (R. 105) and the case and motion were argued before the Circuit Court of Appeals, December 3, 1940 (R. 118). While it does not appear at just what time petitioner discovered that its appeal from the order of January 31, 1940 had been taken after expiration of the time for appeal, it does appear that in spite of that, it nevertheless attempted to raise before

B. **Such issues had been finally determined and had become res judicata.**

On appeal from decrees or orders made subsequent to a prior final decree from which no appeal is taken, there can be no review by the appellate court of the issues determined by the prior decree. (*Terry* v. *Sharon*, 1889, 131 U. S. 40, 33 L. ed. 94; *Central Trust Co.* v. *Grant Locomotive Works*, 1890, 135 U. S. 207, 34 L. ed. 97; *Turner* v. *Farmers' Loan & Trust Co.*, 1883, 106 U. S. 552, 27 L. ed. 273; *Reed* v. *Allen*, 1932, 286 U. S. 191, 76 L. ed. 1054; *Long* v. *Maxwell*, 4 Cir. 1894, 59 Fed. 948; *Lafontan* v. *Elting*, 2 Cir., 1932, 58 F. (2d) 180.)

The issues thus determined by the prior final decree are *res judicata*. (*Turner* v. *Farmers' Loan & Trust Co.; Central Trust Co.* v. *Grant Locomotive Works; Hinckley* v. *G. C. & S. R. R. Co., supra; Mayer* v. *White*, 8 Cir., 1926, 12 F. (2d) 710.)

And the prior final decree or judgment, not set aside on appeal, is equally effective as an estoppel upon the issues decided, whether the decree be correct or erroneous. (*Reed* v. *Allen, supra.*)

If the rule were otherwise, litigation would become interminable, and the statutes prescribing terms within which appeals may be taken would be rendered nugatory.

The foreclosure decree of September 18, 1939 was beyond question a final and appealable decree as to the issues with respect to petitioner's tax claim. It adjudicated the specific amounts of the mortgage debts due respondent, the amount of its mortgage lien on each parcel of property, and the amount of taxes due petitioner on each of the various parcels involved. It also determined that taxes in the amount of approximately $5,000 constituted a lien on the mortgaged property in preference to that of the mortgagee; but it determined, further, that with respect

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the appellate court the questions which while properly within the scope of review in the abortive appeal (assuming said order to be appealable), were outside the scope of review on the appeal from the order of April 3, 1940.

to the remaining part of petitioner's claim for taxes, its lien was subordinate to that of respondent. Payment of the mortgage debts by a day certain was ordered, in default of which it was decreed that the properties should be sold on foreclosure, free and clear of all liens, by a Special Master named in the decree. Provision was made for the distribution of the proceeds of this foreclosure sale. It provided that if respondent should be the successful bidder in this sale, it could apply the mortgage debts to the payment of the purchase price; but if the amount of any accepted bid of respondent should be equal to or less than the mortgage debt on the property to which such bid referred, respondent was obliged to pay in cash that part of the bid required to cover the expenses of the sale, the real estate taxes held to constitute a lien prior to that of respondent, any unpaid indebtedness properly incurred by the receiver in operating the properties and the compensation of the receiver.

This was clearly a final and appealable decree as to petitioner's claim. (*Central Trust Co.* v. *Grant Locomotive Works; Turner* v. *Farmers' Loan & Trust Company; Mayer* v. *White, supra; Harrison* v. *Clark,* 8 Cir. 1908, 164 Fed. 539, cert. den. 214 U. S. 524, 53 L. ed. 1067.)

Petitioner contends that the decree would have been final and appealable but for paragraph "O" thereof (R. 85) which he asserts rendered it interlocutory[12] (Petition pp. 17 *et seq.*).

As to this contention, the District Court, in denying petitioner's motion for reconsideration, held and said (R. 89):

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[12] Paragraph "O" reads as follows:

> "All questions, issues, matters and things not hereby disposed of are hereby reserved by the Court for its further adjudication, and any party to this cause may at any time apply to the court for further relief at the foot of this decree in respect of any matters not herein specifically provided for. For the purpose of making any further order or decree in relation to any matter arising in connection with this decree, or any sale thereunder, the present term of this court is continued."

> "Such a decree is clearly final for it determines the rights of the parties so that nothing is left to be done but the execution of its provisions. Affirmance of such a decree by the Appellate Court would end the suit and execution of the provisions thereof by this Court would be all that remained to be done. The reservation in the decree for further directions simply related to such execution and cannot be availed of as rendering it less final or as leaving open points expressly decided by it at the time it was entered."

And petitioner's unseasonable appeal from this holding was dismissed by the Circuit Court of Appeals (R. 117).

Similar provisions in a final decree have frequently been so interpreted by the Courts. (*Bank* v. *Sheffey*, 1891, 140 U. S. 445, 35 L. ed. 493; *American Engineering Co.* v. *Metropolitan By-Products Co.*, 2 Cir., 1921, 275 F. 40; *Harrison* v. *Clark, supra; Kiehn* v. *Dodge County*, 8 Cir., 1927, 19 F. (2d) 503.)

And if there were in fact any ambiguity or uncertainty in the meaning which the District Court sought to convey by the language of paragraph "O" of the decree, certainly the one authoritative source to resolve the ambiguity or make certain the uncertain would be the court (here the same judge) who rendered the decree. (*Mercantile Trust Co. of N. Y.* v. *Chicago, P. & St. L. Ry.*, 7 Cir. 1903, 123 F. 389; *Elder* v. *McCloskey*, 6 Cir. 1895, 70 Fed. 529, 555 *et seq.*)

Extracting and isolating the second sentence of paragraph "O", petitioner, through rare ingenuity, is apparently able to discover that the District Court left open for readjudication any and all questions determined by the decree and continued the then term of Court for such purpose. We are unable to see what petitioner sees. The first sentence plainly reserves for further adjudication any matters not determined in the decree. The second sentence continues the term of court for making any further order or decree (not for modifying the foreclosure decree) *in relation to any matter arising in connection with this decree or any sale thereunder.* The words *in relation to any*

matter arising in connection with this decree are not the equivalent of the words *any matter determined by this decree,* as petitioner would have the Court believe. If so, then the first sentence of paragraph "O" of necessity becomes absolutely meaningless. The language *any matter arising in connection with this decree* presupposes the existence of the decree with some collateral matter arising in connection with its application or execution. An examination of the entire decree will show that many matters might have arisen, and they in fact did arise, in connection with its application and execution other than the sale made thereunder.

The suggestion that the last sentence of paragraph "O" was expressly designed by the court to permit readjudication of petitioner's tax claim in the event the Circuit Court of Appeals should reverse the District Court in the appeal then pending in the cases of *The People of Puerto Rico* v. *The Federal Land Bank, supra,* seems to be a wistful afterthought of petitioner. As we have already pointed out, the determination of the validity of Section 5 of Act No. 23 of July 16, 1936, as amended, was not involved in the foreclosure decree. (See note 8, *supra.*) And the District Court said (R. 91) that that appellate decision could not have affected the foreclosure decree of September 18, 1939.

Furthermore, after the foreclosure decree, the sale was had and confirmed (Dec. 11, 1939), the conveyances were executed (Dec. 23, 1939), possession of the properties delivered to the purchaser (January 16, 1940), and the distribution of the proceeds of sale was made by the master, all without objection or opposition of petitioner. The case of *The People of Puerto Rico* v. *The Federal Land Bank, supra,* was decided by the appellate court December 15, 1939 (three days before expiration of the term for taking an appeal from the foreclosure decree). And the District Court knew of this appellate decision at least by December 26, 1939 (R. 86), probably earlier. If the District Court thought, or had ever thought, that the pending appeal in that case might affect the correctness of the fore-

closure decree, it is inconceivable that it would have continued with the execution of the foreclosure decree and the distribution of the proceeds of sale.

In support of its contention that the foreclosure decree was interlocutory, and not final, petitioner now urges that its motion for reconsideration should have been considered as a bill of review for error apparent on the face of the record, and granted by the District Court.[13] Quite aside from the impropriety of raising that question now, for no appeal was seasonably taken from the order of January 31, 1940, denying the motion, it is quite clear that such a contention is utterly frivolous, and at the same time absolutely inconsistent with petitioner's contention that the foreclosure decree was interlocutory and not final. In the first place, a bill of review lies only against a final decree. And in the second place, if brought to correct error apparent on the face of the record a bill of review must be brought within the term for appeal. (See cases in note 5, *supra.*) The motion for reconsideration was not filed until after expiration of such statutory term (R. 89-90).

The decree of confirmation of the foreclosure sale is likewise a final and appealable decree. (*Turner* v. *Farmers' Loan & Trust Co.; Mayer* v. *White, supra; Dant & Russell, Inc.* v. *J. D. Halstead Lumber Co.*, 9 Cir., 1939, 103 F. (2d) 306.) Petitioner never appealed from that decree. And even if it had done so, issues determined by the foreclosure decree could not have been there reviewed. (*Turner* v. *Farmers' Loan & Trust Co., supra.*)

And the order approving the master's distribution of the proceeds of the sale, his final accounting and discharging him and directing cancellation of his bond was likewise final. (See *Krietmeyer* v. *Hemphell,* 5 Cir., 1927, 19 F.

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[13] By the English rule the error must have been apparent on the "body of the decree" which, however, means the same as "apparent on the face of the record", because in th English practice the whole pleadings and findings in substance were embodied in the decree, while in the federal practice the files of record and the findings are not so embodied. (*Whitney* v. *Bank of United States,* 1839, 13 Pet. 6, 10 L. ed. 33.)

(2d) 513, cert. den. 275 U. S. 496, 72 L. ed. 392; *Dant & Russell* v. *J. D. Halstead Lumber Co., supra.*) But no question determined by the prior final foreclosure decree or order confirming the sale could have been raised on an appeal therefrom.

Assuming that the order of January 31, 1940 denying the motion for rehearing was an appealable order, that appeal has been dismissed because taken after expiration of the statutory term. That means that the Circuit Court of Appeals acquired no jurisdiction and that petitioner could not, therefore, have had an appellate review of that order. In spite of this petitioner urges as a ground for certiorari that there is an error apparent on the face of the record as to said order denying the motion for reconsideration (Petition, pp. 31-32).

And in conclusion, we reiterate that petitioner would have this Court assume that there is error apparent on the face of the record, without having brought up the record,[14] and in the face of the District Court's holding that there was no such error.

It seems highly questionable for a litigant who has so inexplicably failed, as has petitioner, to avail itself of the liberal and simple remedies afforded by the appeal statutes of long standing, to now assert that the trial court has failed to discharge its "plain duties" and has "deliberately disregarded" the applicable statutory law. Particularly is that so when such assertions are made in the face of holdings by the trial court to the contrary and in the absence of inclusion in the transcript of record of the evidence on which said holdings were made.

POINT III

The petition shows no ground for certiorari.

From the above it is clear that none of the questions presented by petitioner (Petition, pp. 9-12) were at issue

[14] The transcript of the record on appeal, here presented, does not include the evidence upon which the foreclosure decree was made nor all of the pleadings.

in the appeal below from the order of April 3, 1940, approving the receiver's final accounts, discharging him and directing cancellation of his bond.

Moreover, the foreclosure decree was a final decree from which no appeal was taken. And no appeal was taken from the order denying a reconsideration thereof.

The motion for reconsideration was not a bill of review to correct error apparent on the face of the record, and if so considered, was unseasonably filed.

Furthermore, the foreclosure decree did not involve any determination of the validity of Section 5 of Act No. 23 approved by the Puerto Rican Legislature July 16, 1936, as amended.

Finally no question as to the lien or priority of petitioner's tax claim was raised in the proceedings in the District Court leading to the order of April 3, 1940.

Conclusion

The decision of the Circuit Court of Appeals is correct. There is no conflict of decisions, no question of Federal law of public importance calling for a review by this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. Henri Brown,
Walter L. Newsom, Jr.,
Counsel for Respondent.

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